80-1779

No.

Office-Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

HOWARD ELLIS,
Petitioner,

vs.

LOMER ELLIS, SR.; and IRENE ELLIS, his wife;
and LOMER ELLIS, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTION PRESENTED

I. WHETHER A STATE MAY CONSTITUTIONALLY DENY A DEFENDANT THE RIGHT TO PROVE HIS OWN CHARACTER, IN DEFENSE OF A CIVIL SUIT ALLEGING WILLFUL AND MALICIOUS CONDUCT AND SEEKING PUNITIVE DAMAGES.

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No.

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HOWARD ELLIS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner, Howard Ellis, respectfully prays that a Writ of Certiorari issue, to review the Opinion Reversing And Remanding, of the Kentucky Court of Appeals, rendered in this proceeding on November 7, 1980; and that said Opinion be reversed.

OPINIONS BELOW

The Opinion of the Kentucky Court of Appeals, sought to be reviewed, was rendered November 7, 1980, and is reported in ____ SW 2d ____. The Opinion is contained in Appendix Four of this Petition For Writ Of Certiorari.

The Order of the Kentucky Court of Appeals, denying rehearing, was entered on February 13, 1981, and appears in Appendix Five.

The Order of the Kentucky Supreme Court, denying discretionary review, was entered March 24, 1981, and appears in Appendix Six.

JURISDICTION

The jurisdiction of this Court is invoked, under 28 U.S.C. 1257 (3).

The Opinion of the Kentucky Court of Appeals, reversing and remanding, was rendered November 7, 1980. It is reported in ____ SW2d ____, and is attached, as Appendix Four.

A timely motion for extension (rehearing) was made by appellee (petitioner), which motion was denied, by Order dated February 13, 1981 (Appendix Five).

A timely motion for discretionary review by the Supreme Court of Kentucky, was made by the appellee (petitioner), which motion was denied, by Order dated March 24, 1981 (Appendix Six).

This Petition For Writ Of Certiorari is timely, under 28 U.S.C. 2101 (c).

STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The brothers, Lomer Ellis and Howard Ellis, are grain farmers, in McLean County, Kentucky. There is enmity between them.

The Ellis lands adjoin. Their lands are large, flat, fertile, and productive. A singular curse of grain farmers, is that of the noxious grasses, "Wild Cane" and "Johnsongrass".

On February 13, 1979, the appellants (Lomer Ellis, Sr.; and Irene Ellis, his wife; and Lomer Ellis, Jr. — the three hereinafter collectively referred to as "Lomer"), filed suit in the McLean County Circuit Court, at Calhoun, Kentucky, alleging that Howard Ellis, the defendant, trespassed upon the plaintiffs' lands and cast or threw Johnsongrass and Wild Cane seed. The complaint alleged that the act was done *intentionally, willfully,* and *maliciously.* Lomer sought damages, *compensatory* and *punitive* (Complaint, Appendix One).

Lomer's case was circumstantial. Howard denied the allegations, and the inferences of circumstance (Answer, Appendix Two).

Upon trial, the Circuit Court of McLean County, Kentucky, permitted Howard Ellis to produce character witnesses, who offered testimony before the jury, as to Howard's own character traits, based upon a good community reputation. The jury returned a verdict for the defendant, Howard Ellis (Appendix Three, Trial Order and Judgment of November 16, 1979).

Lomer Ellis appealed to the Kentucky Court of Appeals; and that Court reversed (Appendix Four, Opinion Reversing and Remanding, dated November 7, 1980), holding that the introduction of character evidence on behalf of Howard was erroneous. *Howard Ellis then petitioned for a rehearing of the case, in order to consider the Constitutional implications.* The Court of Appeals of Kentucky denied said petition (Appendix Five, Order of February 13, 1981).

Howard Ellis then moved the Supreme Court of Kentucky for discretionary review. The Kentucky Supreme Court denied review (Appendix Six, Order of March 24, 1981).

Howard Ellis now brings this Petition For Writ Of Certiorari To The Court Of Appeals Of Kentucky.

REASONS FOR GRANTING THE WRIT

Kentucky law does not permit a defendant to prove his own character, in defense of a civil suit alleging willful and malicious acts and seeking punitive damages. *Colker* v. *Connecticut Fire Insurance Company,* 224 Ky. 837, 7 SW2d 502 (1928).

The foregoing rule was applied to the petitioner, Howard Ellis, by the Kentucky Court of Appeals, in the decision sought to be reviewed (Appendix Four).

Petitioner insists that the rule denying the right to prove his own character, in defense of a civil allegation of wrongdoing wherein punitive damages are prayed, abridges his rights under the Fourteenth Amendment to the United States Constitution, which provides as follows:

> . . .nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Under our system, the last ditch in protecting one's property in resort to the courts of law. It is fundamental, that due process requires the proceedings be fair and adequate.

Where one citizen seeks to punish another in a civil proceeding, the latter ought to be able to have the triers of fact consider and evaluate his own character. This much of compurgation should remain if a defendant is to have a fair and adequate opportunity to resist punishment in a civil proceeding. See, for example, *Hess* v. *Marinari,* 81 W. Va. 500, 84 SE 968 (1918), where the West Virginia court reasoned that there is no distinction between a criminal proceeding and a civil proceeding that seeks to punish.

In the case *sub judice,* the proof on behalf of the plaintiffs was circumstantial. The defendant, Howard Ellis, entered a general denial. If the defendant cannot have the jury consider

and evaluate his own character, he has no defense at all! Certainly, in these days of reckless accusations, there is merit in permitting a defendant to have his character evaluated by the triers of fact, as a defense to an allegation of wrongdoing and as a prelude to punishment.

If the Fourteenth Amendment does not mandate such, then no man's property is safe from seizure.

CONCLUSION

The American people are increasingly using civil proceedings to punish their fellow man. It is urged, that the Fourteenth Amendment mandates that a civil defendant in a claim for punitive damages may defend by proof of his own relevant character traits.

There should be no difference in punishment by one's fellow man, and that emanating from the State. Either way, it encompasses the judicial process of the State.

Petitioner prays that this writ be granted, and that the decision of the Court of Appeals of Kentucky be reversed.

This, the 16th day of April, 1981.

Respectfully submitted,

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APPENDIX

APPENDIX ONE

COMMONWEALTH OF KENTUCKY
McLEAN CIRCUIT COURT

No. 79-CI-012

Lomer Ellis, Sr., Irene Ellis, his wife, and
Lomer Ellis, Jr.,
Plaintiffs,

vs.

Howard Ellis
Route 1
Sacramento, Kentucky 42372,
Defendant.

COMPLAINT

Come the plaintiffs for their complaint against the defendant and state as follows:

1. The plaintiffs and the defendant are all residents of McLean County, Kentucky.

2. Plaintiffs own and at all time mentioned herein have been in possession of two (2) tracts of land located near Sacramento in McLean County, Kentucky, known as a 21.33 acre tract which was acquired by Lomer Ellis, Sr., and Irene Ellis, his wife, from John Heltsley, et ux, by deed dated February 19, 1949, and recorded in Deed Book 40, page 593, in the McLean County Court Clerk's Office and hereinafter referred to as the 21 acre tract, and a tract known as a 33.97 acre tract acquired by Lomer Ellis, Sr., and Irene Ellis, his wife, from Frank Garst, et ux, by deed dated February 28, 1952, and recorded in Deed Book 44, page 50, in the McLean County Court Clerk's Office which is hereinafter referred to as the 34 acre tract.

3. Lomer Ellis, Jr., joins in this action as a plaintiff because during all times pertinent hereto, he has been a business partner with Lomer Ellis, Sr., in agricultural operations conducted on the above referred to tracts, and with the permission of the owners he has shared possession of the land in question.

4. On or about October 6, 1977, the defendant without permission of the plaintiffs and knowingly and willfully trespassed on and entered upon the 21 acre tract and the 34 acre tract of land in a pick-up truck motor vehicle and willfully, intentionally, maliciously, and wantonly spread, threw, cast, placed or seeded the two tracts of land with Johnsongrass seed and Wild Cane seed with malicious intent to damage the plaintiffs and the said land.

5. At all times pertinent hereto, the plaintiffs were using the said 21 acre tract and 34 acre tract for agricultural purposes. Said tracts were under cultivation and have been for many years.

6. As a direct and proximate result of the intentional and malicious trespass of the defendant, the plaintiffs were damaged in that they were required to take expensive measures to attempt to prevent the germination or growth of the Johnsongrass and Wild Cane seed placed upon the land by the defendant. They were required to purchase and spread a chemical called Treflan on the land and expend much time and labor in attempting to prevent the growth of the Johnsongrass and Wild Cane seed. They were required to purchase and assemble a Chem-farm spray, tanks, pumps, nozzels and attachments, and they were required to use tractors, discs and other equipment in the processes which were necessary and reasonable to attempt to prevent the germination and growth of the Johnsongrass and Wild Cane seed.

7. The plaintiffs special damages directly and proximately resulting from the trespass of the defendant include, but are not limited to the following:

Reduced production of soybeans on the affected tracts in 1978	$ 4,000.00
Chem-farm spray, tanks, pumps, nozzels and attachments	3,000.00
Treflan used in 1978	680.00
Time spent in preparing land for and applying chemicals to land in 1978	720.00
Use of two tractors, discs and labor to operate equipment during 1978	1,500.00
Total Special Damages	$ 9,900.00

8. As a direct and proximate result of the trespass of the defendant the plaintiffs will suffer future damages to the land in question and its productivity in the amount of $12,000.00 as a result of reduced productivity of the land, and expenses which will be incurred in continuing to treat the land to avoid the growth and spread of Johnsongrass seed and Wild Cane seed.

WHEREFORE the plaintiffs pray judgment against the defendant in the amount of $21,900.00 for general and special damages and in the amount of $50,000.00 addition for exemplary and punitive damages. Further the plaintiffs pray that they recover their costs herein expended and have such other and further relief to which they may appear entitled. Plaintiffs demand trial by jury.

This 13 day of February, 1979.

SANDIDGE, HOLBROOK &
CRAIG, P.S.C.

By: /s/ Ronald M. Sullivan
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Attorneys for Plaintiffs

APPENDIX TWO

COMMONWEALTH OF KENTUCKY
McLEAN CIRCUIT COURT

No. 79-CI-012

Lomer Ellis, Sr., and Irene Ellis, his wife, and
Lomer Ellis, Jr.,
Plaintiffs,

vs.

Howard Ellis,
Defendant.

ANSWER

Comes the defendant, by and through counsel, and for his answer to the plaintiffs' Complaint, states as follows:

1.

The plaintiffs' complaint fails to state a cause of action against the defendant for which relief can be granted.

2.

The defendant admits the allegations contained in Paragraphs 1 and 2 of the plaintiffs' complaint.

3.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the plaintiffs' complaint. Therefore, the allegations contained in said Paragraph 3 should be taken as denied, pursuant to Civil Rule 8.02.

4.

The defendant specifically denies the allegations contained in Paragraphs 4 and 5 of the plaintiffs' complaint; and also specifically denies the allegations contained in paragraph six (erroneously numbered Paragraph 5); and the allegations contained in Paragraphs 7 and 8 of the plaintiffs' complaint.

WHEREFORE, the defendant prays that the plaintiffs' complaint be dismissed and that they take nothing thereby; for the defendant's costs herein expended; and for any other just and proper relief to which this honorable Court deems the defendant entitled.

This, the 16th day of March, 1979.

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APPENDIX THREE

COMMONWEALTH OF KENTUCKY
McLEAN CIRCUIT COURT

No. 79-CI-012

Lomer Ellis, Sr., Irene Ellis, his wife, and
Lomer Ellis, Jr.,
Plaintiffs,

vs.

Howard Ellis,
Defendant.

TRIAL ORDER AND JUDGMENT

This matter came on for trial before jury on October 23, 1979; and the respective parties appeared with counsel. Eighteen jurors were empaneled to answer truthfully upon voir dire; the respective parties conducted voir dire examination and exercised their respective challenges, whereupon twelve jurors were seated to truthfully try the matters in issue:

Billy Murphy
Harry Gatton, Jr.
Gary W. Capps
J. Bodo Loyd
Bobby G. Girvin
Hugh T. Miller
Kenneth Luck
Judy Stratton
Paul E. Graham
Wendell Ray Smith
Bruce Floyd
Ollie Jeffries

Evidence was offered by the parties, first by the plaintiffs and then by the defendant.

A transcript of the entire proceeding was had.

The trial was continued from day to day until completed.

At the close of the plaintiffs' case, each party moved for a directed verdict, which motions were overruled. Said motions were renewed at the close of the entire case and were against overruled. Whereupon, the case was submitted to the jury for deliberation.

After deliberation, the jury returned to the Courtroom with a verdict in the following form, to-wit:

2. We, the jury, find for the defendant.

9-3

For Plaintiffs	We the undersigned hold for the defendant For Defendant
/s/ Billy Murphy	/s/ J. Bodo Loyd
/s/ Harry Gatton, Jr.	/s/ Bobby G. Girvin
/s/ Gary W. Capps	/s/ Hugh T. Miller
	/s/ Kenneth Luck
	/s/ Judy Stratton
	/s/ Paul E. Graham
	/s/ Wendell Ray Smith
	/s/ Bruce Floyd
	/s/ Ollie Jeffries

JUDGMENT

Now therefore, the Court being sufficiently advised and in conformance with the foregoing verdict of the jury; IT IS ORDERED AND ADJUDGED that judgment be, and is, hereby entered for defendant and the plaintiffs' complaint is ordered dismissed at the cost of the plaintiffs.

Further, the Court order not.

This 14th day of November, 1979.

/s/ JUDGE B. R. PAXTON

PREPARED BY:

/s/ John D. Miller
Attorney for Defendant

HAVE SEEN:

/s/ Ronald M. Sullivan
Attorney for Plaintiffs

APPENDIX FOUR

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

FILE NO. 80-CA-792-MR

Lomer Ellis, Sr., Irene Ellis, his wife, and
Lomer Ellis, Jr.,
Appellants,

v.

Howard Ellis,
Appellee.

Appeal from McLean Circuit Court
Honorable Arthur T. Iler, Special Judge
Civil Action No. 79-CI012

REVERSING AND REMANDING

BEFORE: COOPER, HOWARD and VANCE, Judges.

COOPER, Judge. This is an appeal from a judgment for the appellee, defendant below, in an action for intentional trespass. The question presented herein is whether the trial court erred in allowing the appellee to introduce evidence with respect to his reputation for truth and honesty. On review, we find that the trial court so erred and reverse and remand.

In February of 1979, the appellants, Lomer Ellis, Sr., Irene Ellis, and Lomer Ellis, Jr., filed this action against the appellee, Howard Ellis, for intentional trespass. Specifically, the appellants alleged that in October of 1977, the appellee willfully trespassed on land owned by them, and damaged said land by

spreading seeds of Johnson Grass and wild cane on it. The appellants sought both compensatory and punitive damages. Thereafter, the action was tried, with the appellants' evidence against the appellee being primarily circumstantial. In defending the action, the appellee acted as a witness in his own behalf. During his cross-examination, the appellee was impeached by the use of a prior inconsistent statement. The appellee then sought, over the objection of the appellants, to introduce evidence of his good reputation for truth and veracity as well as honesty and fair-dealing. This testimony, in the form of numerous character witnesses, was permitted by the trial court. The jury subsequently found for the appellee and it is from this judgment that the appellants now appeal.

Principally, the appellants argue that the trial court committed reversible error in allowing the introduction of character evidence in behalf of the appellee. We agree. As a general rule, evidence of character is inadmissible in civil litigation. *West* v. *Mason,* 2 Ky. Opin. 316 (1868). As a corollary to this rule, it has been held that evidence of a party's good character is inadmissible in a civil action in which the party is charged with wrongdoing. *Northern Assurance Co.* v. *Griffin,* 236 Ky. 296, 33 S.W.2d 7 (1930); *Colker* v. *Connecticut Fire Ins. Co.,* 224 Ky. 837, 7 S.W.2d 502 (1928). Such a rule derives from the principal that only relevant evidence should be admissible. Where the pleadings in an action raise an issue of fact rather than one of the character of a party, evidence of that party's character is irrelevant and therefore inadmissible. *Hignite* v. *Nantz,* 254 Ky. 214, 71 S.W.2d 442 (1934).

This rule excluding evidence of a party's character where character is not an issue derives as well from the concept of fundamental fairness and impartiality. To allow a party to introduce evidence of his reputation when such is not an issue is to allow for the possibility of unnecessary prejudice. Such evidence of no probative value to the factual questions at issue can only

result in unfairness to the other party. Here, the issue before the jury was not the appellee's honesty, but whether he committed the act of intentional trespass. In allowing the appellee to introduce abundant character witnesses, the trial court inadvertedly transformed an impartial judicial proceeding into a swearing contest. Such was clearly prejudicial to the appellants. *Leahman* v. *Broughton,* 196 Ky. 146, 244 S.W. 403 (1922).

Aside from the question of fundamental fairness, the trial court's action clearly violated established rules of evidence. The credibility of a witness or party may not be rehabilitated by character evidence until after it has, in fact, been attacked. *Shell* v. *Commonwealth,* 245 Ky. 223, 53 S.W.2d 524 (1932); Lawson, *Kentucky Evidence Law Handbook,* §4.5 (A)(3) 1976. Furthermore, a witness or party who has been impeached by the use of a prior inconsistent statement may not seek to be rehabilitated through the introduction of evidence of his good reputation for truth and veracity. *See* Lawson, *supra,* §4.10(C)(3); *Vance* v. *Vance,* 59 Ky. 581, 8 Ky. Opin. 399 (1859).

Here, the appellee sought to rehabilitate his credibility by the introduction of character evidence after he had been impeached by the use of a prior inconsistent statement. And, he sought to introduce evidence of his reputation for honesty and veracity when his reputation had not been attacked. Given these facts, together with the inevitable prejudice which resulted to the appellants, we are bound to reverse the judgment below, and direct the trial court to enter a new trial for the appellants.

Accordingly, the judgment of the trial court is reversed, with directions that a new trial be entered for the appellants.

ALL CONCUR.

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APPENDIX FIVE

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

FILE NO. 80-CA-792-MR

Lomer Ellis, Sr.; Irene Ellis; and
Lomer Ellis, Jr.,

vs.

Howard Ellis.

Appeal From McLean Circuit Court
Action No. 79-CI-012
Honorable Arthur T. Iler

ORDER DENYING PETITION FOR REHEARING

BEFORE: VANCE, COOPER and HOWARD, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: FEBRUARY 13, 1981

Roy D. Vance
JUDGE, COURT OF APPEALS

APPENDIX SIX

SUPREME COURT OF KENTUCKY
81-SC-133-D
(80-CA-792-MR)

Howard Ellis,
Movant,

v.

Lomer Ellis, Sr., Irene Ellis and Lomer Ellis, Jr.,
Respondents.

McLean Circuit Court
#79-CI-012

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Howard Ellis for a review of the decision of the Court of Appeals is denied.

ENTERED March 24, 1981.

John S. Palmore
Chief Justice